FILE
NOV 17 1
JOHN F. DAVIS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 832

ERIE-LACKAWANNA RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Of Counsel:
HARRY H. VOIGT,
ELDON OLSON,
DORSEY D. ELLIS, JR.,
JOHN M. LINSENMEYER,
CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York, N. Y. 10005

J. KENNETH CAMPBELL,
ALEXANDER & GREEN,
120 Broadway,
New York, N. Y. 10005

PAUL J. COUGHLIN, JR.,
NIXON MUDGE ROSE GUTHRIE
ALEXANDER & MITCHELL,
20 Broad Street,
New York, N. Y. 10005

THOMAS D. BARR,
1 Chase Manhattan Plaza,
New York, N. Y. 10005
Attorney for Erie-Lackawanna Railroad Company

HARRY G. SILLECK, JR.,
20 Broad Street,
New York, N. Y. 10005
Attorney for The Delaware and Hudson Railroad Corporation

TABLE OF CONTENTS

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL IF THE COURT REMANDS EITHER THE INCLUSION CASE OR THE APPENDIX G CONDITIONS TO THE COMMISSION	7
I. THIS COURT HAS DECIDED THAT CONSUMMATION OF THE PENN-CENTRAL MERGER SHOULD BE DEFERRED UNTIL THE ULTIMATE FATE OF EL AND D&H IS FINALLY DETERMINED	7
II. THE COMMISSION SHOULD HAVE RESERVED JURISDICTION TO REQUIRE A CAPITAL LOSS INDEMNIFICATION OF EL AND D&H BY PENN-CENTRAL, SHOULD JUDICIAL REVIEW AND REMAND OF THE INCLUSION CASE RESULT IN DOWNWARD REVISION OF THE TERMS FOR INCLUSION BECAUSE OF THE ALLEGED TRAFFIC CONSEQUENCES OF THE PENN-CENTRAL MERGER	8
CONCLUSION	11

AUTHORITIES

CASE: PAGE

Baltimore & Ohio R. Co. v. *United States*, 386 U. S. 372 (1967) 4, 7

STATUTES:

Judicial Code, 28 U. S. C.:

Section 1253 ..... 2, 3

Section 1336(a) 2, 3

Section 1398(a) 2, 3

Section 2101(b) 2, 3

Section 2284 ..... 2, 3

Sections 2321-25 ..... 2, 3

Interstate Commerce Act, 49 U. S. C.:

Section 5(2) 3, 10

Section 5(9) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ERIE-LACKAWANNA RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Erie-Lackawanna Railroad Company (EL) and The Delaware and Hudson Railroad Corporation (D&H) appeal from that part of the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellants' complaints seeking to enjoin the enforcement of orders of the Interstate Commerce Commission (the Commission), dated April 6, 1966, September 16, 1966, and June 9, 1967, which permitted immediate consummation of the merger of Pennsylvania Railroad Company and The New York Central Railroad Company (the Penn-Central *Merger* case). That judgment also affirmed the orders of the Commission dated June 9, 1967, and August 10, 1967, directing the Norfolk and Western Railway Company (N&W) to include EL, D&H and Boston and Maine Corporation (B&M) in the N&W system (the *Inclusion* case).

OPINION BELOW

The memorandum order of July 3, 1967, and the October 19, 1967, opinion of the statutory three-judge court convened in the Southern District of New York are not yet reported. Copies of those decisions are reproduced as Appendices A and B, respectively, to the Jurisdictional Statement in No. 778, with which this appeal will be consolidated pursuant to this Court's per curiam order of November 9, 1967. The reports and orders of the Commission, dated April 6, 1966, September 16, 1966, and June 9, 1967, are reported at 327 I. C. C. 475, 328 I. C. C. 304 and 330 I. C. C. 328, respectively.

JURISDICTION

This action, commenced under 28 U. S. C. §§ 1336(a), 1398(a), 2284 and 2321-25, was brought to enjoin, annul and set aside orders of the Commission dated April 6, 1966, September 16, 1966, and June 9, 1967. The order of the district court dismissing the complaints was entered on October 19, 1967. Notice of appeal was filed in that court on November 17, 1967. Jurisdiction of this Court to review the order of the district court by direct appeal is conferred by 28 U. S. C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

Solely because of the concurrent appeals from the Commission's orders in the *Inclusion* case and in the *Merger* case the following questions are presented:

1. Whether the Commission's order permitting immediate consummation of the Penn-Central merger satisfied the mandate of this Court requiring that the ultimate fate of EL, D&H and B&M be determined prior to consummation of that merger.

2. Whether the Commission should have reserved jurisdiction to require a capital loss indemnification of EL and D&H by Penn-Central in the event that judicial review and remand of the *Inclusion* case resulted in a downward revision of the terms for inclusion of EL and D&H in N&W because of the alleged traffic consequences of the Penn-Central merger.

Should the Court affirm or dismiss the concurrent appeals from the district court's affirmance of the Commission's order in the *Inclusion* case and its affirmance of the Appendix G conditions in the *Merger* case the foregoing questions will become moot.

STATUTES INVOLVED

The statutes involved are the Interstate Commerce Act, Sections 5(2) and 5(9), 49 U.S.C. §§ 5(2) and 5(9), and the Judicial Code, 28 U. S. C. §§ 1253, 1336(a), 1398(a), 2101(b), 2284 and 2321-25. The texts of those statutes are set forth in Appendix A hereto.

STATEMENT

This appeal, together with the appeals of Baltimore and Ohio Railroad Company, *et al.*, in No. 778; Oscar Gruss & Son, in No. ; New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee, in No. ; City of Scranton, *et al.*, in No. , and Reading Company in No. , bring to this Court for the second time the decision of the Commission approving the Penn-Central merger. Operation of the Commission's orders of April 6, 1966, and September 16, 1966, authorizing consummation of that merger, was enjoined

pursuant to the decision of this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967), holding that it was necessary to determine the future of EL, D&H and B&M before the Penn-Central merger could be consummated.

By its order of June 9, 1967, in the *Merger* case, the Commission authorized consummation of the Penn-Central merger on or after July 17, 1967. By a simultaneous order in the *Inclusion* case, the Commission directed N&W to acquire EL, D&H and B&M on specified terms.

On July 3, 1967, the United States District Court for the Southern District of New York preliminarily enjoined the enforcement of the order in the *Merger* case pending consideration by it of appeals from the Commission's orders in that case. On October 19, 1967, the district court entered its judgment dismissing the complaints of appellants and others which attacked the Commission's orders in the *Merger* case and the earlier Commission orders upon which that order was based. Jurisdictional Statement, No. 778 (J. S. 778), at B-71-72. The district court stayed the enforcement of the Commission's order of June 9, 1967, for 15 days or until the determination of any application for a stay filed in this Court within that period. *Ibid.*

In its unanimous decision of October 19, 1967, the three-judge district court also upheld the Commission's decision the *Inclusion* case. That the *Inclusion* and *Merger* cases are interrelated was recognized by this Court on the earlier appeal in the *Merger* case, *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. at 378, 390-92, acknowledged by the Commission in issuing its orders in both cases on the same day and by the court below in disposing of all actions with respect to those cases in a single opinion and judgment, J. S. 778, at B-1, and confirmed by this Court's per curiam order of November 9, 1967, consolidating all appeals from that single judgment.

The Commission's decisions in both the *Inclusion* and *Merger* cases are now under attack in this Court. Appellants in No. 778 urge the illegality of the Commission's prescription of protective conditions for the benefit of EL, D&H and B&M in Appendix G to its report and order in the *Merger* case. J. S. 778, at 3-4. Because of the possibility, which we believe is small, that the protective conditions thus imposed would not be sustained or, alternatively, that the *Inclusion* case might be remanded to the Commission, appellants requested the court below to stay the consummation of the Penn-Central merger, pending final disposition by this Court of the two cases. The district court declined, in part because of its confidence that its decision with respect to the *Merger* and the *Inclusion* cases was correct and in part because of its belief that any further delay in consummation of the Penn-Central merger might result in interruption of the operations of the New York, New Haven & Hartford Railroad Company. J. S. 778, at B-68-69.

The major attack upon the Commission's decision in the *Inclusion* case comes from N&W.* Jurisdictional Statement, No. 779 (J. S. 779). Basically, N&W argues that the price which the Commission found to be fair and equitable to all the parties is too high. In support of that position, N&W challenged before the Commission and the court below nearly all of the particular findings concerning the elements of value of the three roads to be included.

---

*A minor and belated assault upon that decision was also launched in the district court by a group of EL bondholders who had deliberately declined to participate in the administrative proceedings until the matter was submitted to the full Commission. They have now filed a notice of appeal to this Court. B&M also contested the Commission's order in the court below and has filed a notice of appeal.

Among other things, N&W has contended that Penn-Central will have an impact on the traffic of EL and D&H, even after their inclusion in N&W, which requires a further downward adjustment of the terms for inclusion. Both the Commission and the court below have thoroughly considered and rejected all of N&W's challenges. We believe this Court will similarly reject N&W's contentions.

However, EL and D&H requested the Commission to retain jurisdiction in the *Merger* case for the purpose of requiring Penn-Central to indemnify appellants for any capital loss found to be incurred by them as a result of the Penn-Central merger. That step was taken as a necessary precaution against the admittedly slight possibility that a reviewing court might remand the *Inclusion* case to the Commission for a possible downward adjustment of the terms because of the alleged impact of Penn-Central. The Commission found that a reservation of jurisdiction was unnecessary because it believed the order in the *Inclusion* case would survive judicial review. 330 I. C. C. 328, 329. The district court concluded that the Commission was not required to retain jurisdiction for that purpose, although it "would not have disapproved the reservation of jurisdiction". J. S. 778, at B-17. Again, the principal basis for the district court's decision was its confidence that this Court would not overturn the decision with respect to that issue. *Id.* at B-16. We share the confidence of the Commission and the court below. However, the stakes are too high to justify us in treating that confidence as a certainty.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL IF THE COURT REMANDS EITHER THE *INCLUSION* CASE OR THE APPENDIX G CONDITIONS TO THE COMMISSION.

I.

THIS COURT HAS DECIDED THAT CONSUMMATION OF THE PENN-CENTRAL MERGER SHOULD BE DEFERRED UNTIL THE ULTIMATE FATE OF EL AND D&H IS FINALLY DETERMINED.

This Court decided that consummation of the Penn-Central merger must be deferred until the "ultimate fate" and "future" of EL and D&H—as well as B&M—is finally determined. *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 378, 390. The fate and future of EL and D&H are dependent upon the Commission's order in the *Inclusion* case surviving judicial review unimpaired. The district court refused to stay consummation of the Penn-Central merger because it entertained "no doubt with respect to [its] rulings" in the *Merger* and the *Inclusion* cases. J. S. 778, at B-68-69. However, should consummation of the Penn-Central merger be allowed prior to the culmination of judicial review and, in the course of that process, the protective conditions accorded EL and D&H be stricken down or the decision in the *Inclusion* case overturned, EL and D&H would be required to face alone the massive impact of the largest railroad merger in our history. That result is precisely what the Court intended to prevent by its decision last term, and, our position now is intended simply to preclude even the slight possibility that EL and D&H might somehow be backed into the position in which they were before that decision last spring.

The Commission has found that "the appendix G railroads will require the interim protection of appendix G" if for any reason there is a time lapse between the consummation of the Penn-Central merger and the inclusion of EL and D&H in the N&W system. 330 I. C. C. 328, 329. However, the validity of those interim protective conditions is now under attack by N&W and its allies in this Court. *See, e.g.,* J. S. 778, at 3-4.

We believe those conditions are lawful and will be sustained by this Court. However, we obviously cannot guarantee that result. The Commission's decision in the *Inclusion* case has also been attacked by N&W (and others) in this Court. We share the confidence of the Commission and the district court in the correctness and validity of that decision.

However, it seems inconceivable and certainly not contemplated by this Court that the Penn-Central merger could be consummated without both a final resolution of the validity of the Appendix G conditions and a final resolution of the future of EL and D&H.

II.

THE COMMISSION SHOULD HAVE RESERVED JURISDICTION TO REQUIRE A CAPITAL LOSS INDEMNIFICATION OF EL AND D&H BY PENN-CENTRAL, SHOULD JUDICIAL REVIEW AND REMAND OF THE *INCLUSION* CASE RESULT IN DOWNWARD REVISION OF THE TERMS FOR INCLUSION BECAUSE OF THE ALLEGED TRAFFIC CONSEQUENCES OF THE PENN-CENTRAL MERGER.

The possibility that a capital loss indemnity of EL and D&H by Penn-Central might be required is founded upon the public interest in maintaining rail competition to the ex-

tent feasible after consummation of the Penn-Central merger. The Commission has found that the service which EL and D&H provide is essential and must be preserved. 327 I. C. C. 475, 529. The Commission has further found that, unless EL and D&H are included in a major system, it is doubtful whether they could survive the competition of a merged Penn-Central. *Id.* at 532.

EL, D&H and B&M provide the only substantial rail competition with Penn-Central in the area east of Buffalo, New York. N&W's present lines do not run east of Buffalo or north of Hagerstown, Maryland, and, therefore, the inclusion in N&W of those three roads, with their lines from Buffalo to New York City, northern New York, Montreal and New England, is a logical step to provide routes in the Northeast competitive with Penn-Central. 330 I. C. C. 780, 792. The Commission has stated in the *Inclusion* case that, because of the effects upon competition, it is "firmly convinced" that inclusion of EL, D&H and B&M in N&W is preferable to their inclusion in Penn-Central. *Id.* at 796.

In authorizing consummation of the Penn-Central merger, the Commission acted with the expectation, but without the necessary certainty, that its order in the *Inclusion* case would survive judicial review. 330 I. C. C. 328, 329. The district court declined to require the Commission to retain jurisdiction for the purpose of imposing a capital loss indemnity provision on Penn-Central (1) because of its decision upholding the Commission's action in the *Inclusion* case, as to which it entertained no serious doubt, J. S. 778, at B-16, B-69; (2) because it doubted that any decision by this Court would result in a downward revision of the terms for inclusion, *id.* at B-16; (3) because it was not certain that this Court or the Commission on remand would require a capital loss indemnity, *ibid.;* and (4) because of the possibility of the imposition of such a condi-

tion subsequent to consummation of the Penn-Central merger, *id.* at B-16-17, B-69.*

The capital loss indemnity issue arises here only because N&W has again asserted that even after EL and D&H are included in N&W, they would lose a substantial amount of traffic to a merged Penn-Central. Therefore, N&W contends that the price which the Commission found fair and equitable to all parties should be adjusted downward to reflect that alleged traffic loss. J. S. 779, at 3, 12 n.6; N&W's Brief of September 5, 1967, in the *Inclusion* case at 18-31.

If the Commission should conclude upon any remand that, because of an alleged future diversion by Penn-Central of a substantial amount of EL and D&H traffic, N&W should pay a price for EL and D&H which is substantially less than the price which N&W has been directed to pay, then the Commission could not fix terms for inclusion in N&W which are equitable to EL and D&H. On the other hand, the Commission might determine that it would not be consistent with the public interest to include EL and D&H in Penn-Central. Thus the service rendered to the public by EL and D&H would be destroyed, rail competition in the northeastern United States eliminated and the communities which those roads serve seriously and irreparably injured.

In that event the only salvation to EL and D&H and to the public they serve would be the imposition by the Commission in the *Merger* case of a condition requiring a capital indemnity from Penn-Central to the stockholders of EL and D&H, pursuant to Section 5(2)(b) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(b), sufficient to enable the Commission to frame equitable terms for their inclusion in

*The Commission stated to the court below that if the *Inclusion* order were set aside the Commission might properly be directed to consider imposition of a capital loss indemnification condition in the *Merger* case. Commission Brief of August 28, 1967, at 14; *cf.* J. S. 778, at B-17, B-69.

the N&W system. By failing to reserve jurisdiction to meet that possibility, the Commission has failed to take a desirable and necessary precaution to protect appellants and the public served by them.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

November 17, 1967.

Respectfully submitted,

THOMAS D. BARR,
1 Chase Manhattan Plaza,
New York, N. Y. 10005
Attorney for Erie-Lackawanna Railroad Company

HARRY G. SILLECK, JR.,
20 Broad Street,
New York, N. Y. 10005
Attorney for The Delaware and Hudson Railroad Corporation

Of Counsel:

HARRY H. VOIGT,
ELDON OLSON,
DORSEY D. ELLIS, JR.,
JOHN M. LINSENMEYER,
CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York, N. Y. 10005

J. KENNETH CAMPBELL,
ALEXANDER & GREEN,
120 Broadway,
New York, N. Y. 10005

PAUL J. COUGHLIN, JR.,
NIXON MUDGE ROSE GUTHRIE
ALEXANDER & MITCHELL,
20 Broad Street,
New York, N. Y. 10005